Supreme Court, U.S.
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NO._____

In the
SUPREME COURT OF THE UNITED STATES

LYLE THOMAS SHELTON,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

ON PETITION FOR A WRIT OF CERITORARI TO THE

NEVADA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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I. Questions Presented For Review

1. Whether the Fourth Amendment to the United States Constitution requires an objective, articulate reason for the police to direct a person to exit a lawfully parked automobile.

2. Whether a search of an individual, seated in a lawfully parked car, done without probable cause or reasonable suspicion of criminal activity or ordinance infraction, can be upheld after the fact on a "caretaker" or "public safety" rationale? If so, what is the standard for such rationale?

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A. The Fourth Amendment to the United States Constitution requires an objective, articulable reason for the police to order or request a person to exit a lawfully parked automobile.

B. The "caretaker" or "public safety" exception to the Fourth Amendment warrant requirement must not be standardless, but must be based upon an appropriate balancing test, the balance of which, in this case, favors suppression of all evidence seized.

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28 U.S.C. 2101(d)
28 U.S.C. 2254

Fourth Amendment to the U.S. Constitution
Fourteenth Amendment to the U.S. Constitution

NRS 484.379
NRS 484.3792(1)(c)

Supreme Court Rule 10(b) and (c)
Supreme Court Rule 12.1.
Supreme Court Rule 16.1

II. NAME OF PARTIES

Lyle Thomas Shelton, Petitioner; and the State of Nevada, Respondent.

III. CITES OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED

Lyle Thomas Shelton v. State of Nevada, Unpublished Order Dismissing Appeal, Nevada Supreme Court, No. 31390, November 24, 1998.

IV. STATEMENT OF BASIS OF JURISDICTION

This is an Application for Certiorari from the Supreme Court of the state of Nevada.

Mr. Shelton was charged by criminal information with being in actual physical control of a motor vehicle while intoxicated, third offense within seven years, in violation of NRS 484.379 and 484.3792(1)(c). The jury in Reno, Nevada returned a verdict of guilty in October of 1997. A mandatory prison sentence ensued in November of 1997, but Mr. Shelton appealed to the Supreme Court of the state of Nevada, and bail pending appeal was granted. Mr. Shelton litigated five (5) issues to the Nevada Supreme Court; his fifth issue constituted the above-referenced Fourth Amendment issues. The Nevada Supreme Court entered its Order Dismissing Appeal in the within case on November 24, 1998. Mr. Shelton filed a timely petition for rehearing.

The Nevada Supreme Court entered its Order Denying Rehearing on May 5, 1999. Mr. Shelton promptly filed a motion for Stay of Remittitur, and the same was granted on June 2, 1999.

This Petition has been filed within 90 days of the Order Denying Rehearing. Therefore, this Court has jurisdiction to hear this Petition pursuant to 28 U.S.C. § 2101(d) and Supreme Court Rule 12.1.

Per Supreme Court Rule 10(b) and (c), we contend that this Court should grant Certiorari because a state court of last resort, the Nevada Supreme Court, has decided an important federal constitutional question in a way that conflicts with relevant decisions of this Court; that the lower courts have a split of authority regarding the relevant issue, with Nevada having sided (albeit inadvertently) with the minority view; and that in denying Petitioner's Petition for Rehearing on the ground asserted by the State of Nevada, the Nevada Supreme Court decided an important question of federal constitutional law (by omission) which has not been, but should be, settled by this Court.

V. FEDERAL LAW INVOLVED

The Fourth Amendment to the United States Constitution states:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution states, in pari materia:

Section 1. . . Nor shall any State deprive any person, liberty, or property without due process of law;...

VI. STATEMENT OF FACTS

The Nevada Supreme Court did not discuss the facts in any particularized detail in its Order Dismissing Appeal. However, we believe the facts to be essentially undisputed:

Daniel Myers, an officer with the Reno Police Department, was on patrol at approximately 11:30 p.m. on November 27, 1996, in the area of Cashill and Skyline Boulevards in Reno, Nevada. As he drove north on Cashill, he saw a vehicle legally parked on the east side of the road. Mr. Shelton's vehicle was parked facing north, with its lights on and its motor running. Officer Myers did not see anyone in the vehicle at first, and his first concern was that someone might be hurt or the vehicle may have been subjected to a vehicle burglary. As he drove by slowly, however, he saw Mr. Shelton in the driver's seat asleep or unconscious, and Mr. Shelton was leaning back against the seat. The seat was partially reclined. Mr. Shelton's hands were below the window. Mr. Shelton's seat belt was unfastened.

Officer Myers believed that when he first passed by that the vehicle was illegally parked as an unattended, running vehicle; but when he pulled

up and saw Mr. Shelton in the driver's seat, he knew of no criminal violation at that point. He had no knowledge that anything illegal had occurred, and no knowledge that Mr. Shelton needed any kind of assistance. Officer Myers' reason for investigating was simply that he "wanted to find out what the circumstances were." Officer Myers tapped on the Petitioner's window to attempt to arouse him. After tapping on the roof of the car, Mr. Shelton came to in a startled fashion, and started slapping hard at the driver's side window. Officer Myers yelled at the Appellant to turn off his engine. Mr. Shelton did so.

Officer Myers' specific testimony appeared in the record below as follows:

Q: After he shut the vehicle off, were you able to communicate with this individual?

A: I attempted to continue to communicate with him.

Q: Was it successful or unsuccessful?

A: It was a delayed response, and he asked for things. What I asked him to do then was to step out of the car. And instead of getting out of the car or attempting to open the door, what he did was put his hand over his hip to activate, I expect where the controls were for electric windows, which, of course was unsuccessful because he had turned the ignition off and there was no power to the electric windows. I continued to ask him to open the door; however, he diverted his attention and started trying to manipulate controls in an apparent effort to turn off the lights, which, eventually, he did turn off the headlights to the car; and then he turned the ignition to the "On" position, didn't restart the car, and then lowered the window instead of getting out of the car as I'd asked. . . . Once the window was down, I was still trying to get

him to step out of the car. However, the ignition was still turned ~~to~~ the "On" position, even though the car was not running, and the radio was on. And, again, the driver became distracted to that, and he started pushing at the radio itself, like at the buttons and things, and I could hear, because the radio was up loud enough, it was changing the channels, and he continued to do that until he finally pushed a button which turned the radio off. At that time, I was able to get him to open the door and step out of the car.

Mr. Shelton was parked in front of his own home. It is not unusual for people in that particular neighborhood to park their vehicles on the street.

Mr. Shelton's position to the court below (and here) is that his Fourth Amendment rights were violated when Officer Myers directed him to exit his vehicle, and investigated him further. Mr. Shelton asserts that, at the time he was told to leave his vehicle, Officer Myers had no information that Mr. Shelton or anyone in that neighborhood had been involved in, or was the victim of any criminal activity, and that there was no evidence at that point in time that Mr. Shelton was in any apparent or known distress. Further, at the time Officer Myers directed Mr. Shelton to exit the vehicle, Officer Myers had no information that Mr. Shelton had been drinking or was under the influence of intoxicants; that knowledge came only after Officer Myers ordered Mr. Shelton out of the vehicle and Officer Myers investigated the situation further.

Both the state of Nevada and the Nevada Supreme Court appeared to concede, implicitly, that Officer Myers had no probable cause or reasonable

suspicion to investigate anything, whether criminal/traffic violations or health and safety concerns, at the time Officer Myers directed Mr. Shelton to exit his vehicle. However, the position of Nevada was that Mr. Shelton, under those circumstances, enjoyed no Fourth Amendment rights; Officer Myers had the unfettered discretion to order Mr. Shelton to exit the vehicle, regardless of any cause or suspicion.

In its Order Dismissing Appeal of November 24, 1998, the Nevada Supreme Court adopted Nevada's position. Specifically, the Nevada Supreme Court stated:

> "Based on our review of the record on appeal, we conclude that the police officer's approach towards Appellant's vehicle, and the officer's act of tapping on the driver's side window did not constitute an investigatory stop from which the officer needed a reasonable suspicion of criminal activity. Because Appellant's vehicle was parked on a public street, the officer in question could permissibly approach Appellant's vehicle to question the Appellant or inquire into his welfare without running afoul of the Fourth Amendment. See: Florida v. Royer, 460 U.S. 491, 497 (1983); State v. Burkholder, 112 Nev. 535, 915 P. 2d 886 (1996). Accordingly, the police officer did not need a reasonable and articulable suspicion of criminal activity when he approached Appellant's vehicle and thus the encounter did not constitute an improper investigatory stop in violation of Appellant's Fourth Amendment rights."

In Mr. Shelton's petition for rehearing to the Nevada Supreme Court, he respectfully submitted that that court below severely misapprehended the issue. He stated therein that he did not disagree with the proposition that a police officer can approach a vehicle, tap on the driver's window, wake the

driver up, and signal to the driver to turn off the engine. But, he contended, had Officer Myers done that, and nothing more, this case never would have happened; this case happened because Officer Myers commanded Mr. Shelton to exit the vehicle. Once Mr. Shelton complied, then, and only then, did Officer Myers discover Mr. Shelton's intoxication, which necessarily led to his arrest. Mr. Shelton argued that the precedent of this Court is clearly and unambiguously to the effect that a police officer cannot direct or order a driver out of a vehicle without probable cause or a reasonable suspicion.

In traversing Mr. Shelton's Petition for rehearing, Nevada argued that Mr. Shelton had recast the issue from his initial petition for rehearing, although Nevada candidly admitted that the issue was raised in Mr. Shelton's reply brief prior to the November, 1998 disposition. Nevada then argued that Officer Myers' request to have Mr. Shelton get out of his car was merely an extension of the "caretaker concern" expressly upheld by this Court in Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 2531, 37 L. Ed. 2d 706 (1973), and that at least one court (the Idaho Court of Appeals in State v. McAfee, 783 P. 2d 874, 876-77 (Idaho App. 1989)) was in accord with that approach.

The Nevada Supreme Court summarily denied the Petition for Rehearing. Therefore, it is unknown whether the Nevada Supreme Court stuck to its original reasoning, or adopted Nevada's theory articulated in the Re-

sponse to the Petition for Rehearing.

VII. REASONS FOR GRANTING THE WRIT

A. THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES AN OBJECTIVE, ARTICULABLE REASON FOR THE POLICE TO ORDER OR REQUEST A PERSON TO EXIT A LAWFULLY PARKED AUTOMOBILE.

To begin with, the notion that a person seated in a lawfully parked motor vehicle has absolutely no protections under the Fourth Amendment is totally without merit. This Court stated in Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979):

"An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, work place and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As Terry v. Ohio [392 U.S. 1, 88 S. Ct. 1860, 20 L. Ed. 2d 889 (1968)] recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles. [Cite omitted]"

Prouse, 440 U.S. at 663-64; 99 Ct. at 1400-1. Further, this Court stated in Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971):

"The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States [267 U.S. 132, 45 S. Ct. 280, 169 L. Ed. 543 (1925)] - no alerted criminal bent on flight, no fleeing opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where it is not practicable to secure a warrant," Carroll, supra at 153, 45 S. Ct. at 285, and the "automobile exception," despite its label is simply irrelevant."

Coolidge, 403 U.S. at 461-62, 91 S. Ct. at 2035-36.

This Court has never held that where a police officer has occasion to speak with a driver of a vehicle, he may also as a matter of course order the driver out of the car. Pennsylvania v. Mimms, 434 U.S. 106, 111, n. 6, 98 S. Ct. 330, 333, n. 6, 54 L. Ed. 2d 331 (1977). Quite the opposite has occurred: This Court has consistently held that as a matter of course a police officer who conducts a lawful traffic stop may order the occupants of the vehicle to exit the same. Maryland v. Wilson, 519 U.S. 408, 410, 117 S. Ct. 882, 884, 137 L.Ed. 2d 41 (1997); Ohio v. Robinette, 519 U.S. 133, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996); Knowles v. Iowa, _ U.S. _ , 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998). Otherwise, this Court's distinction of Prouse, ante in Whrenn v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed 2d 89 (1996) would be meaningless. The Fourth Amendment requires at least a reasonable and articulable suspicion that a motorist has committed an infraction of the law as a precursor to seizing him; but that concern is in fact satisfied

when the driver in fact commits such an infraction, regardless of whether a "reasonable" officer would have seized the driver for that reason. Whrenn, 517 U.S. at 816-19, 116 S. Ct. at 1774-76.

All of this was argued to the Nevada Supreme Court in the opening brief, the reply brief and the oral argument. For the state of Nevada to suggest otherwise is simply wrong. We attach copies of the pertinent portions of the briefs to the appendix, so that this Court will not misapprehend that certiorari cannot providently be granted.

We do not dispute for a moment the proposition that it is a fair generalization that if a law enforcement officer is able, by the use of his natural senses, to discover what is inside a vehicle "while standing in a place where he has a right to be," this discovery does not constitute a Fourth Amendment search. LaFave, Search & Seizure, 3d. ed., 2.5(c), p. 557. Neither do we dispute for a moment that it is not unlawful, but entirely lawful for a police officer who is on a public street or a sidewalk to look, either deliberately or inadvertently, into an automobile that is parked on the street and to observe what is exposed therein to open view. Likewise, there is no rule which precludes the introduction into evidence of objects seen through the window of an automobile by a law enforcement officer who in the performance of his duties is making a blanket surveillance of automobiles in a public parking lot by looking through the windows. LaFave, Id at 558; and see: United States v.

Knotts, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983).

But from that starting point the Nevada Supreme Court goes one step further: if such an officer sees someone or something that doesn't "strike him right," even if he can't articulate it, as long as he has a "hunch" that something may be wrong, he may invade the owner's privacy without a warrant, either by ordering him out of the vehicle or by searching the vehicle. That simply is not the law.

This Court held in New York v. Class, 475 U.S. 106, 106 S. Ct. 960, 89 L.Ed. 2d (1986) that an automobile's interior is subject to Fourth Amendment protection from unreasonable intrusions by the police. Class, 475 U.S. at 114-15, 106 S. Ct. at 966. Therefore, the Fourth Amendment would not authorize police officers to enter a vehicle to obtain a dashboard-mounted V.I.N. when the V.I.N. is visible form the outside of the vehicle; in that instance there is no justification for governmental intrusion into the passenger compartment to see it. Class, 475 U.S. at 119, 106 S. Ct. at 968-69.

Likewise, "police hunches" simply do not constitute a proper standard as to justify a warrantless automobile search under the Fourth Amendment. This Court made clear in United States v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581, 104 L.Ed. 2d 1 (1989) that a reasonable suspicion entails some minimal level of objective justification for making a stop, that is, something more than an unparticularized suspicion or hunch, but less than the level of

suspicion required for probable cause. Sokolow, 490 U.S. at 7, 109 S. Ct. at 1585.

Further, contrary to what the Nevada Supreme Court may think, in no way does Florida v. Royer, ante, stand for the proposition that the police, upon looking into a vehicle and seeing something that strikes them as strange, order the occupants out of the vehicle without any further cause or suspicion.

Royer was a 5-to-4 holding, upholding suppression based on the scope of the investigatory stop (as opposed to the fact of it), but Justice Brennan, concurring in the result, dissented on the point of the initial stop. He noted that, per Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), the scope of any Terry-type of investigation must be extremely limited, or the Terry exception will swallow the general rule that the Fourth Amendment searches and seizures are reasonable only if based on probable cause. Royer, 460 U.S. at 510-11, 103 S. Ct. at 1331. Because only four justices out of the nine agreed on the lack of probable cause ruling, it was error for the Nevada Supreme Court to cite Royer with any authority. It is well settled that when no single rationale commands a majority of the Supreme Court, the holding of the Court may be viewed as the position taken by those members who concurred in the judgment on the narrowest grounds. City of Lakewood v. Plain Dealer Publishing Company, 486 U.S. 750, 764, n.9, 108 S. Ct. 2138, 2148, n.9, 100 L. Ed. 2d 771 (1988), and cases cited

therein. Thus, Rover's holding has to do with the scope of the investigatory stop, not the fact of it.

Secondly, Rover is an "on foot" case, whereas this case is an "automobile" case. To the extent that the Nevada Supreme Court believes that Rover permits the police to order or request citizens out of their vehicles without any type of cause or suspicion, consistent with the Fourth Amendment, the distinction is with a difference.

Thirdly, the point made in Rover was subsequently adopted by a majority of this Court in I.N.S. v. Delgado, 466 U.S. 210, 104 S. Ct. 1758, 8 L. Ed. 2d 247 (1984), and Florida v. Bostick, 501 U.S. 429, 434, 437, 111 S. Ct. 2382, 2836, 2387, 115 L. Ed. 2d 389 (1991), but must be read in light of those cases. Per Delgado, an officer who goes beyond questioning and engages in conduct, wherein a reasonable person would not feel free to leave, implicates the Fourth Amendment. Delgado, 466 U.S. at 215-17, 104 S. Ct. at 1762-63. Per Bostick, consensual questions to a defendant and a request to produce identification and to search luggage is not a search or seizure, so long as the officers do not convey a message that compliance with their requests is required. Clearly, a citizen's decision to cooperate with law enforcement authorizes the police to conduct a search without first obtaining a warrant only if the cooperation is voluntary. "Consent" which is not the product of official intimidation or harassment is no consent at all. Citizens

do not forfeit their constitutional rights when they are coerced to comply with a request they would prefer to refuse. Bostick, 501 U.S. at 438, 111 S. Ct. at 2388.

The Nevada Supreme Court's reliance on Royer, without reference to Bostick or Delgado, created the very type of error that has gone on for the past decade in the state of Illinois. In People v. Murray, 560 N.E. 2d 309 (Ill. 1990), the Illinois Supreme Court, relying upon Royer and United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed 2d 497 (1980), even while acknowledging that Royer and Mendenhall were not majority opinions, held that where an officer merely "requests" an individual to exit a vehicle, no Fourth Amendment seizure occurs when the vehicle's occupant immediately complies with the "request." Murray, 560 N.E. 2d at 312-14. Citing Murray as authority, although Murray was decided prior to Bostick, the Appellate Court of Illinois, without considering Bostick, held that overhead flashing lights, with no other "show of authority," did not implicate the Fourth Amendment. People v. Quigley, 589 N.E. 2d 133, 135-36 (Ill. App. 1992). Then, in City of Highland Park v. Lee, 683 N.E. 2d 962 (Ill. App. 1997), the very same Appellate Court of Illinois held that use of officer vehicle overhead lights in fact constituted a show of authority sufficient to implicate the Fourth Amendment. In so holding, that court disapproved Quigley and relied upon Bostick. Lee, 683 N.E. 2d at 964-66.

Obviously, the Appellate Court of Illinois could not say that the Illinois Supreme Court was wrong in Murray; but in light of Delgado and Bostick, in hindsight, they clearly were. If a uniformed police officer awakens a sleeping occupant in a motor vehicle by rapping on the window and signals to the occupant several times to "get out," such is clearly a show of authority per Bostick and Delgado. Whether the Fourth Amendment is implicated should not turn on whether the officer said, "please," or whether the occupant responded "why should I have to?!"

Indeed, the basic definition of a "seizure" is this: a "seizure" occurs when there is some meaningful interference with an individual's possessory interest in that property. United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984), and cases cited therein. Following that basic definition, when an agent of the state directs the movements of a citizen, that citizen is "seized"; seizure does not turn on whether the agents label their activities as "orders" or "requests." Most reasonable citizens, including Mr. Shelton, are expected to and in fact comply with directions of a police officer, and not make the officer say, "I order you to get out." Creating this distinction would therefore give Fourth Amendment protections only to citizens who are or may be rebellious and/or obstructionist.

That certainly would be unwise policy; and it would be policy that obscures the greater meaning of the Fourth Amendment, which is in part to

protect citizens' interests in privacy. Texas v. Brown, 460 U.S. 730, 747, 103 S. Ct. 1535, 1546, 75 L. Ed 2d 502 (1983) [J. STEVENS, concurring in judgment] Clearly, when Mr. Shelton was napping in his lawfully parked car, parked next to his own home, he had a very real expectation of being left alone until he was ready to walk back into his home. He did not have any reasonable expectation of being awakened, being directed to exit his vehicle, and being arrested at that time.

Other courts which have considered the question, both post- and pre-1991, have determined that an officer who directs activity upon the part of the suspect, such as telling him to "stop" or "halt", implicates the Fourth Amendment within the test of Delgado and Bostick, whether or not the direction is labelled as a "request" or as a "command." See: United States v. Wood, 981 F. 2d 536, 539-41 (D.C. Cir. 1992) [reversing conviction]; Revels v. State, 666 P. 2d 1298, 1300 (Okl. Cr. App. 1983) [reversing conviction]; United States v. Tolbert, 692 F. 2d 1041, 1046 (6th Cir. 1982); United States v. Palmer, 603 F. 2d 1286, 1288-89 (8th Cir. 1979) [reversing conviction]; People v. Boodle, 418 N. 4. Supp. 2d 352, 354 (N.Y. 1979); Hughes v. State, 588 S.W. 2d 296, 302-08 (Tenn. 1979); State v. Quezada, 681 A. 2d 79, 81 (N.H. 1996); Parker v. Commonwealth, 496 S.E. 2d 47, 49-50 (Va. 1998); and People v. Padgett, 932 P. 2d 810, 813-14 (Colo. 1997) [affirming grant of motion to suppress].

Notwithstanding the fact that the Nevada Supreme Court's view of Fourth Amendment law is clearly contrary to the direction that this Court has set forth over the past three decades, there actually is lower court authority in accord with what the Nevada Supreme Court did here. This Honorable Court needs to take certiorari and to disapprove those cases, in addition to reversing this one.

In State v. Williams, 371 So. 2d 1074 (Fla. App. 1979), the Florida Court of Appeals held that approaching a parked car and ordering the occupants out was not a Terry stop, reasoning that that holding followed from Mimms. Professor LaFave criticizes the Williams holding, noting that the court was "most assuredly incorrect," because Williams involved no lawful stop or ground therefor, and thus, no factor implicating officer safety was involved. LaFave, ante, 9.3 (a), p. 107.

In spite of Professor LaFave's criticism of Williams, Williams has been cited as authority in State v. Schlosser, 774 P. 2d 1132, 1138 (Utah 1989), People v. Maxwell, 254 Cal. Rptr. 124, 127 (Cal. App. 1988), and Cousart v. United States, 618 A. 2d 96, 108 (D.C. App. 1992)[1]

Likewise, in Borowitz v. North Dakota Department of Transportation, 529 N.W. 2d 186 (N.D. 1995), a case with very similar facts to this one, except in the context of driver's license revocation rather than criminal conviction, the North Dakota Supreme Court held that a police officer who looks

through a window and sees a person asleep in the car is justified in ordering the person out of the car. Borowitz, 529 N.W. 2d at 188. The Borowitz opinion does not clearly indicate whether the officer had a reasonable suspicion of the driver's intoxication before he ordered him out of the vehicle, although the officer detected "symptoms consistent with intoxication" based in part on a conversation the officer had, before requesting the driver to exit the vehicle; accordingly, Borowitz is arguably in accord with Williams, and to that extent, likewise needs to be disapproved.

A final practical reason exists for the granting of certiorari herein. If this were a Fifth Amendment issue, the position could always be taken that Mr. Shelton could explore his issue in the guise of a 28 U.S.C. 2254 writ. However, per Stone v. Powell, 428 U.S. 465, 495, 96 S. Ct. 3037, 3052, 49 L. Ed. 2d 1067 (1976), where the state has provided the opportunity for a full and fair litigation of a Fourth Amendment claim, the state prisoner cannot be granted Federal habeas corpus relief on the basis that the evidence obtained against him was the product of an unconstitutional search and seizure. Here, Mr. Shelton had his "full and fair opportunity"; and the summary denial of this writ, we respectfully submit, could be tantamount to saying, "The Nevada Supreme Court was wrong, but so what? In fact, they were clearly, egregiously wrong; but so what? We're not interested. Mr. Shelton, go to prison." We submit that that approach would be fundamentally unjust. If the

Court concludes that the Nevada Supreme Court clearly misapprehended the scope of the Fourth Amendment, just as Professor LaFave so concluded with respect to the Florida Court of Appeals in Williams, then pursuant to this Honorable Court's powers per Supreme Court Rule 16.1, it should summarily reverse the Nevada Supreme Court's order dismissing appeal and remand for further proceedings. Cf. Florida v. Rodriguez, 469 U.S. 1, 12 (1984).

B. THE "CARETAKER" OR "PUBLIC SAFETY" EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT MUST NOT BE STANDARDLESS, BUT MUST BE BASED UPON AN APPROPRIATE BALANCING TEST, THE BALANCE OF WHICH, IN THIS CASE, FAVORS SUPPRESSION OF ALL EVIDENCE SEIZED.

The state of Nevada argued to the Nevada Supreme Court that the seizure of Shelton could be upheld on a "public caretaking" or "public safety" type of rationale, based upon Cady v. Dombrowski, ante. Clearly, Cady is factually inapposite. This Court upheld a warrantless seizure of a vehicle where it was left parked and disabled along a highway, such that it was a nuisance, and the accused was intoxicated and comatose, and therefore could not make arrangements to have the vehicle towed and stored, and the standard inventory search of the trunk, revealing a revolver, ensued. Cady, 413 U.S. at 441, 93 S. Ct. at 2528. Significantly, unlike this case, the vehicle was

not on the premises or in the custody of the owner at the time it was seized and searched. Cady, 413 U.S. at 448-49, 93 S. Ct at 2531. However, obiter dictum in Cady indicates that the police could properly engage in a "caretaking function" in seizing the vehicle. From that dicta, lower courts have created a "public safety" exception to the Fourth Amendment's warrant requirement, which does not require probable cause or even a reasonable suspicion of any type of criminal—whether felony or misdemeanor—activity afoot or in the recent past.

We submit that the best analysis of this issue is contained in United States v. Dunbar, 470 F. Supp. 704 (D. Conn. 1979), affirmed, 610 F. 2d 807 (2d Cir. 1979) (table). As noted in Dunbar, where an officer stops a defendant for a stated benign purpose (of assisting the motorist), both the governmental interests and the privacy interests are slight; but if the individual is not even remotely suspected of any conduct in violation of criminal or regulatory standards, and if the police do not have adequate objective (that is, good faith and reasonable) reasons for believing that the motorist is in need of assistance, then the Fourth Amendment is implicated. The Fourth Amendment stands against initiating a new line of cases in which the officer says, "I thought he was lost," and justifies his seizure based thereon. Dunbar, 470 F. Supp. at 707-08. Cases in accord with Dunbar include: People v. Deppert, 403 N.E. 2d 1279, 1283 (Ill. App. 1980); State v. Brown, 509 N.W. 2d 69, 71-

72 (N.D. 1993); State v. Oxley, 503 A. 2d 756, 759 (N.H. 1985); State v. Morton, 951 P. 2d 179, 182 (Or. App. 1997); State v. Templeman, 492 S.E. 2d 902, 904 (Ga. App. 1997). In fact, McAfee, ante, cited by Nevada to the Nevada Supreme Court as authority for denying the Petition for Rehearing, also is in accord.

We submit that Dunbar is perfectly in accord, both with the objective test of Whrenn v. United States, ante, and the balancing test of Wilson, ante, and Mimms, ante. That is to say, if a police officer were to see an occupant of a vehicle truly in distress based upon objective factors, it would be hard to argue the proposition that that officer must not render assistance to such an occupant, unless there is also probable cause or a reasonable suspicion of criminal activity. On the other hand, however, if an officer sees no such objective facts by which he could reasonably conclude that the vehicle's occupant is in need of assistance, and there otherwise are no facts indicating probable cause or a reasonable suspicion of criminal activity afoot, it is absolutely offensive to the Fourth Amendment to permit the officer to "make something up" after the fact, as the supposed justification for engaging in the warrantless seizure. If that conduct is allowed, then why not allow "storm troopers" to invade our homes for no particular reason without a warrant and later say, "I thought they were sick"??

The Dunbar approach is also consistent with this Court's pronounce-

ments in Sibron v. New York, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). This Court rejected "officer safety" as a talisman to justify a standardless "Terry search," as follows:

> Although the Court of Appeals of New York wrote no opinion in this case, it seems to have viewed the search here as a self-protective search for weapons and to have affirmed on the basis of 180-a, which authorizes such a search when the officer "reasonably suspects that he is in danger of life or limb." The Court of Appeals has, at any rate, justified searches during field interrogation on the ground that "[t]he answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great." People v. Rivera, 14 N.Y. 2d 441, 446, 252 N.Y.S. 2d 458, 463, 201 N.E. 2d 32, 35 (1964) cert. denied, 379 U.S. 978, 85 S. Ct. 679, 13 L. Ed. 2d 568 (1965). But the application of this reasoning to the facts of this case proves too much. The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. Terry v. Ohio, supra. Patrolman Martin's testimony reveals no such facts. The suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime. Nor did Patrolman Martin urge that when Sibron put his hand in his pocket, he feared that he was going for a weapon and acted in self-defense. His opening statement to Sibron—"You know what I am after"—made it abundantly clear that he sought narcotics, and his testimony at the hearing left no doubt that he thought there were narcotics in Sibron's pocket. Sibron, 392 U.S. at 64, 88 S. Ct. at 1903.

In this case, Officer Myers saw Mr. Shelton asleep in his motor vehicle, late at night on a public street, with the lights on and the motor running.

To be sure, that was an unusual sight; however, the fact that it was "unusual", by itself, did not give Officer Myers cause to engage in a Fourth Amendment seizure. See: United States v. Smith, 799 F. 2d 704, 709-10 (11th Cir. 1986); United States v. Cruz, 581 F. 2d 535, 542 (5th Cir. 1978); Malina v. Gonzales, 994 F. 2d 1121, 1126 (5th Cir.) rehearing denied, 1 F. 3d 304 (1993); United States v. Powell, 929 F. 2d 1190, 1193-94 (7th Cir.), cert denied, 502 U.S. 981 (1991); United States v. Gastellum, 927 F. Supp. 1386, 1390-93 (D. Colo. 1996); State v. Reynolds, 899 P. 2d 540, 543 (Mont. 1995); Grinde v. State, 813 P. 2d 473, 475 (Mont. 1991); Pomerenke v. Motor Vehicles Division, 896 P. 2d 1214, 1216 (Or. App. 1995); State v. Sierra, 754 P. 2d 972, 979 (Utah App. 1988). Contra: Borowitz, ante, citing Wibben v. North Dakota State Highway Commissioner, 413 N.W. 2d 329, 332-33 (N.D. 1987).

However, rather than immediately order Mr. Shelton out of the vehicle while he was asleep therein or roll down his window and talk, Officer Myers drove by, approached the vehicle, tapped on the window, woke Mr. Shelton up, signaled to Mr. Shelton to turn off his engine, and Mr. Shelton complied. All of that happened before Mr. Shelton was ordered or requested to step out of the vehicle. By the time Mr. Shelton complied with Officer Myers and actually exited the vehicle, it was obvious at that point that Mr. Shelton was not in distress or need of assistance. Thus, at that point, the Fourth Amendment balance clearly tipped in favor of Mr. Shelton's right of

privacy, versus the police officer's safety or concern for the public, including Mr. Shelton. It must not be forgotten that in Wilson, the balance tipped in favor of officer safety because that officer had already detected the driver of the vehicle as having done something wrong, that is, having violated a traffic ordinance. Here, Mr. Shelton had apparently done absolutely nothing wrong, and by the time he exited the vehicle per officer Myers' request, was in no need of assistance. The tension between the majority and the dissent in Wilson is to what extent the Fourth Amendment protects individuals about whom there is not even a scintilla of evidence of any potential risk to the police officer at the time of the stop. Compare 519 U.S. 413, n. 2, 519 U.S. at 415-16; 117 S. Ct. at 885-86, n.2; 117 S. Ct. at 887. It is difficult to understand why the Fourth Amendment offers no protection to an individual like Mr. Shelton, when there not only is not even a scintilla of evidence of any potential risk to the officer at the time of the seizure, but also, there is not even a scintilla of evidence that he (or anyone else) has done anything wrong or is in need of any type of assistance at the time of the seizure.

Accordingly, this Court needs to take certiorari, adopt appropriate standards of review for this important area of law, vacate Mr. Shelton's judgment, and remand for further consideration not inconsistent with the Court's opinion.

DATED this _____ of _____, 1999.

LAW OFFICES OF RICHARD F. CORNELL
150 Ridge Street, 2nd Floor
Reno, Nevada 89501

by:
Richard F. Cornell, Esq.

[1] Williams is factually distinguishable, in that there, the officer received an uncorroborated tip that a weapon was inside the vehicle, before ordering the occupant out of the vehicle. Whether that distinction is with or without a difference, here we don't have anything that criminally suspicious.

Supreme Court, U.S.
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NO._____

In the
SUPREME COURT OF THE UNITED STATES

LYLE THOMAS SHELTON,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

PETITIONER'S APPENDIX ON PETITION FOR A WRIT OF CERITORARI TO THE NEVADA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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70PP

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2	Petition for Rehearing Filed by Shelton	12-28-98 (Recieved) 02-17-99 (Filed)
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IN THE SUPREME COURT OF THE STATE OF NEVADA

LYLE T. SHELTON,
Appellant,
VS.
THE STATE OF NEVADA,
Respondent.

No. 31390

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury trial, on three counts of felony DUI. Appellant argues that the evidence proffered at trial was insufficient to sustain his conviction, and that the jury instruction defining "actual physical control" was prejudicially improper. Additionally, appellant argues that the statutory phrase "actual physical control" is unconstitutionally vague, that the district court erred in admitting certain evidence, and that the police officer's stop violated his Fourth Amendment rights. After careful review of appellant's arguments, we conclude that they are without merit.

Appellant first contends that the evidence adduced at trial was insufficient to sustain his conviction. Specifically, appellant argues that the evidence presented at trial merely established that he was a passive occupant in his vehicle which, at the time of his arrest, was serving as his stationary

shelter. We disagree.

After having had the benefit of oral argument on this matter and based on our review of the record on appeal, we conclude that the jury, acting reasonably, could have found the elements of felony DUI beyond a reasonable doubt. From the evidence presented at trial, the jury could have found that appellant became intoxicated at a restaurant, drove home, and then fell asleep in his vehicle in front of his home with the vehicle's engine running and its headlights turned on. Additionally, the evidence at trial established that this was appellant's third DUI conviction within seven years, thereby satisfying the felony threshold. Because the evidence presented at trial must be construed in a light most favorable to the prosecution, see Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984), we conclude that appellant's conviction rests on sufficient evidence. See NRS 484.379; NRS 484. 3792 (1) (c) . See also Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994); Rogers v. State, 105 Nev. 230, 23334, 773 P.2d 1226, 1228 (1989).

Appellant next contends that the jury instruction defining the term "actual physical control" was prejudicially improper. Moreover, appellant asserts that the district court compounded this error by rejecting his proposed instruction No. 1 and by advising the jury that it needed only to consider, and not find, each of the Rogers factors enumerated in Instruction

No. 14. We disagree.

With regard to Instruction No. 14, we note that the district court instructed the jury on the meaning of the statutory term "actual physical control" by using the definition of that term contained in Rogers. Because Instruction No. 14 was an accurate statement of the law, the district court did not err in so instructing the jury. See Ford v. State, 99 Nev. 209, 215, 660 P.2d 992, 995 (1983).

Further, the district court did not err in rejecting appellant's proposed Instruction No. 1. To the extent that appellant's proposed Instruction No. 1 attempted to differentiate between felony DUI and the misdemeanor offense of being "intoxicated in or about a motor vehicle, " the distinctions between these two offenses were adequately conveyed to the jury through Instruction Nos. 14 and 15. See Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989) (reiterating that if a proffered instruction "misstates the law or is adequately covered by other instructions, it need not be given").

Additionally, the district court's response to the jury's question was not erroneous. The list of factors we set forth in Rogers is not exhaustive, and we have never maintained that each factor must be met before a

determination of "actual physical control" can be established. Accordingly, the district court's response to the jury's question--in which the court advised the jury that it needed to consider, though not necessarily find, each of the Rogers factors --comported with existing law and was not erroneous.

Appellant next contends that due to the legislature's and this court's alleged failure to define the term "actual physical control," with precision, he was denied fair notice that his conduct was proscribed; thus, appellant contends that the statutory phrase "actual physical control" is unconstitutionally vague. This argument is not persuasive.'

Pursuant to Rogers and its progeny, appellant had ample notice, albeit perhaps constructive notice, that an individual could be found to be in "actual physical control" of a vehicle when that individual was found intoxicated and asleep in the driver's seat, with the vehicle's engine running and headlights turned on, while parked on a public street. Accordingly, based on the specificity of the statute itself, along with our subsequent construction of the statute in Rogers and its progeny, we conclude that appellant has failed to meet his burden of demonstrating that the statutory term N'actual physical control'" is unconstitutionally vague. See Cunningham v. State, 109 Nev. 569, 570, 855 P.2d 125, 125, (1993); Childs v. State, 107 Nev. 584, 587, 816

P.2d 1079, 1081 (1991).

Appellant next contends that the district court erred in allowing the testimony of the Nevada Bell records custodian and in admitting evidence of appellant's telephone records. We disagree. The entire thrust of appellant's defense was that he drove home sober, drank alcohol in his home, talked to his stepson and neighbor on the telephone, and then went outside to his vehicle and fell asleep. Conversely, the State maintained that appellant became intoxicated at a restaurant, drove home under the influence, parked his car in front of his home, and then fell asleep. Therefore, appellant's presence or absence from his apartment on the night of November 27, 1996, is not collateral, and thus, contrary to appellant's assertion, NRS 50.085(3) is inapposite.

Accordingly, because the Nevada Bell records custodian's testimony and appellant's telephone records were probative and relevant to a material issue, the district court's admission of such evidence was not manifestly wrong. See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

Appellant last contends that the police officer's investigatory stop

was improper because the officer lacked the requisite reasonable and articulable suspicion of criminal activity necessary to approach appellant's vehicle. This argument is not persuasive.

Based on our review of the record on appeal, we conclude that the police officer's approach towards appellant's vehicle, and the officer's act of tapping on the driver's side window, did not constitute an investigatory stop for which the officer needed a reasonable suspicion of criminal activity. Because appellant's vehicle was parked on a public street, the officer in question could permissibly approach appellant's vehicle to question the appellant or inquire into his welfare without running afoul of the Fourth Amendment. See Florida v. Royer, 460 U.S. 491, 497 (1983); State v. Burkholder, 112 Nev. 535, 915 P.2d 886 (1996).

Accordingly, the police officer did not need a reasonable and articulable suspicion of criminal activity to approach appellant's vehicle, and thus the encounter did not constitute an improper investigatory stop in violation of appellant's Fourth Amendment rights.

Therefore, after reviewing appellant's issues on appeal and concluding that they lack merit, we

ORDER this appeal dismissed

[1] We have recently rejected a vagueness challenge to NRS 484.379(1) (c) in Sereika v. State, 114 Nev. 142, 955 P.2d 175 (1998). Although the constitutional challenge in Sereika was not specifically limited to the "actual physical control" wording of the statute we held that NRS 484.379(1)(c), in its entirety, was "very specific" and "not unconstitutionally vague." Id. at 145-46, 955 P.2d at 177. We have no desire to revisit our holding in Sereika.

cc: Janet J. Berry, Judge

Hon. Frankie Sue Del Papa, Attorney General

Richard A. Gammick., District Attorney

Richard F. Cornell

Judi Bailey, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYLE THOMAS SHELTON,
Appellant,

CASE NO. 31390

STATE OF NEVADA,
Respondent.

APPELLANT'S PETITION FOR REHEARING

Second Judicial District
State of Nevada

THE HONORABLE JANET J. BERRY

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NOW, Lyle T. Shelton, Appellant, and respectfully petitions this Honorable Court for a rehearing pursuant to NRAP 40 and a stay of the issuance of the remittitur pursuant to NRAP 41.

This Petition is brought on the grounds that this Court has overlooked or misapprehended a material matter of fact and a material issue of law per-

taining to the Appellant's fifth issue on appeal: "The investigatory stop was violative of the Appellant's Fourth Amendment rights" (Blue brief, pp. 30-34; Grey brief, pp. 13-17).

DATED this 28 day of December, 1998.

Respectfully Submitted,

LAW OFFICES OF RICHARD F. CORNELL

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STATEMENT OF FACTS

We believe that the facts, as stated at pages 1-3 of the blue brief, are undisputed:

Daniel Myers, an officer with the Reno Police Department, was on patrol at approximately 11:30 p.m. on November 27, 1996, in the area of Cashill and Skyline Blvds. in Reno. As he drove north on Cashill, he saw a vehicle legally parked on the east side of the road. Mr. Shelton's vehicle was parked facing north, with its lights on and motor running. Officer Myers did not see anyone in the vehicle at first, and his first concern was that someone

might be hurt or the vehicle might have been subjected to a vehicle burglary. As he drove by slowly, however, he saw Mr. Shelton in the driver's seat, asleep or unconscious, and Mr. Shelton was leaning back against the seat. The seat was partially reclined. Mr. Shelton's hands were below the window. Mr. Shelton's seatbelt was unfastened. Officer Myers believed that when he first passed by, the vehicle was illegally parked as an unattended, running vehicle; but when he pulled up and saw Mr. Shelton in the driver's seat, he knew of no criminal violation at that point. He had no knowledge that anything illegal had occurred, and had no knowledge that Mr. Shelton needed any kind of assistance. Officer Myers tapped on the Appellant's window, to attempt to arouse him. After tapping on the roof of the car, Mr. Shelton came to in a startled fashion and started slapping hard at the driver's side window. Officer Myers yelled at the Appellant to turn off his engine. Mr. Shelton did so. Officer Myers asked Mr. Shelton to step out of his vehicle. Mr. Shelton did so. Mr. Shelton was parked in front of his own home. It is not unusual for people in that particular neighborhood to park their vehicles on the street.

Mr. Shelton's position is that his Fourth Amendment rights were violated when Officer Myers directed him to exit his vehicle, and investigated him further. Mr. Shelton asserts that, at the time he was told to leave his vehicle, Officer Myers had no information that Mr. Shelton or anyone in that

neighborhood had been involved in, or was the victim of, any criminal activity, and that there was no evidence at that point in time that Mr. Shelton was in any apparent or known distress. Further, at the time Officer Myers directed Mr. Shelton to exit the vehicle, Officer Myers had no information that Mr. Shelton had been drinking or was under the influence of intoxicants.

Both Respondent and this Court appear to concede, implicitly, that Officer Myers had no probable cause or reasonable suspicion to investigate anything, whether criminal/traffic violations or health and safety concerns, at the time Officer Myers directed Mr. Shelton to exit his vehicle. However, the position of the State is that Mr. Shelton, under those circumstances, has no Fourth Amendment rights; Officer Myers had the unfettered discretion to order Mr. Shelton to exit the vehicle, regardless of any cause or suspicion.

In its Order Dismissing Appeal, filed November 24, 1998, this Court adopted the State's position. Specifically, this Court stated:

Based on our review of the record on appeal, we conclude that the police officer's approach towards Appellant's vehicle, and the officer's act of tapping on the driver's side window, did not constitute an investigatory stop from which the officer needed a reasonable suspicion of criminal activ-

ity. Because Appellant's vehicle was parked on a public street, the officer in question could permissibly approach Appellant's vehicle to question the Appellant or inquire into his welfare without running afoul of the Fourth Amendment. See: Elorida v. Royer, 460 U.S. 491, 497 (1983); State v. Burkholder, 112 Nev. 535, 915 P. 2d 886 (1996). Accordingly, the police officer did not need a reasonable and articulable suspicion of criminal activity to approach Appellant's vehicle, and thus the encounter did not constitute an improper investigatory stop in violation of Appellant's Fourth Amendment rights.

DISCUSSION

We respectfully submit that this Honorable Court has severely misapprehended the issue. We don't disagree with the proposition that a police officer can approach a vehicle, tap on the driver's side window, wake the driver up, and signal to the driver to turn off the engine. But had Officer Myers done that, and nothing more, this case never would have happened. This case happened because Officer Myers ordered Mr. Shelton to exit the vehicle. Once Mr. Shelton complied, then, and only then, did Officer Myers discover Mr. Shelton's intoxication, which necessarily lead to his arrest.

The issue, therefore, is not whether a police officer can approach a vehicle or tap on a driver's side window without probable cause or a reasonable suspicion; the issue is whether such an officer can order a driver out of the car without probable cause or a reasonable suspicion.

The two cases cited by this Court do not address the issue. The holding of the United States Supreme Court in Florida v. Rover, supra, is that the defendant, who was a nervous young man paying cash for an airline ticket under an assumed name and carrying heavy bags, could be stopped on foot by the police in an airport and detained temporarily while the police attempted to dispel suspicions that he was a drug courier; however, the scope of that stop did not allow the police to retain his airplane tickets and driver's license and tell him that he was not free to depart.

Relying on this Court held in Burkholder that the police, while engaging in a "proactive drug recognition assignment" on foot, could approach a person on the street, and ask him if the police could search him without implicating his Fourth Amendment protections. Burkholder, 112 Nev. 538-39.

These problems attend, and cannot be reconciled with this Honor-

able Court's decision herein:

First, Royer and Burkholder are both "on foot" cases. This, however, is an "automobile" case, and the distinction is with a dramatic difference. As pointed out at page 13 of the grey brief, the United States Supreme Court has made it clear that the ability to order anybody - driver or passenger - out of a vehicle for any reason depends on a legitimate traffic stop to begin with. Maryland v. Wilson, 519 U.S. 408, 117 S. Ct. 882, 884-86, 137 L. Ed. 2d 41 (1997); Ohio v. Robinette, 519 U.S. 53, 117 S. Ct. 417, 420-21, 136 L. Ed. 2d 347 (1996), and cases cited therein. Ordering a passenger out of a vehicle remains a "seizure" within the meaning of the Fourth Amendment, but when it follows a lawful traffic stop, it is a justified seizure. United States v. Shabazz, 993 F. 2d 431, 437 (5th Cir. 1993), citing Pennsylvania v. Mimms, 434 U.S. 106 (1977).

Obviously, Wilson and Robinette are the apposite Supreme Court authority, while equally as obviously, is inapposite. In fact, after this Honorable Court decided this appeal, the United States Supreme Court handed down Knowles v.Iowa, U. S. (67 U.S.L.W. 4027-28, 12-8-98). There, the United States Supreme Court unanimously held that where the police stop a defendant for speeding and issue a citation, the Fourth Amendment does not per-

mit an officer to order a defendant out of a car and conduct a full field-type search of the vehicle. In so holding, the United States Supreme Court noted that while concern for officer safety justified a "minimal, additional intrusion" of ordering a driver and passengers out of a car after a routine traffic stop, that concern did not by itself justify the often considerably greater intrusion attending a full field-type search. Once a police officer orders a suspect out of a vehicle, further investigation depends on the standards of Terry v. Ohio, 392 U.S. 1 (1968), that is, a reasonable suspicion that the person may be armed and dangerous. Knowles 67 U.S.L.W. at 4028.

Secondly, even before the United States Supreme Court handed down Wilson, Robinette, and Knowles, the authority cited by Respondent to this Court pages 23-27 of the red brief proves beyond a shadow of a doubt that the distinction herein is the proper law and Respondent's position to this Court to the contrary is just plain illegal.

Both State v. Zubartia, 839 P. 2d 1237 (Idaho App. 1992) and People v.Murray, 560 N.E. 2d 309 (111. 1990), cited at pp. 26 and 27 of the red brief, state for this proposition: it is not a "seizure" within the meaning of the Fourth Amendment for an officer to approach and interrogate a person seated in a park vehicle. A request for the suspect to open the door or roll down the

window equally permissable. The encounter may be characterized as a seizure, however if the officer orders, rather than requests, that the occupant open the door or the car. Murray, 560 N.E. 2d at 313-14, citing Jones v. United States, 391 A. 1188, 1190 (D.C. 1978); State v. Smith, 233 S.E. 2d 30, 32 (Ga. App. 1975, W. LaFave Search & Seizure, 9.2 (h) at 416 (2d. Ed. 1987); Zubiarta, 839 P. 2d at 1241, distinguishing State v. McAfee, 783 P. 2d 874 (Idaho App. 1989)

Officer Myer's specific testimony appears at AA15:108-09 (9-11) as follows:

"Q: After he shut the vehicle off, were you able to communicate a little easier with this individual?

A: I attempted to continue to communicate with him.

Q: Was it sucessful or unsuccessful?

A: It was a delayed response, and he asked for things. What I asked him to do then was to step out of the car. And instead of getting out of the car or attempting to open the door, what he did was he put his hand over as if to activate, I expect, where the controls were for electric windows, which, of course, was unsuccessful because he had turned the ignition off and there was no power to the electric windows. I continued to ask him to open the door; however, he diverted his attention and started trying to manipulate

controls in an apparent effort to turn off the lights, which, eventually, he did turn off the headlights to the car; and then, he turned the ignition to the "On" position, didn't restart the car, and then lowered the window instead of getting out of the car as I'd asked.

Once the window was down, I was still trying to get him to step out of the car. However, the ignition was still turned to the "on" position, even though the car was not running, and the radio was on. And, again, the driver became distracted to that, and he started pushing at the radio itself, like at the buttons and things, and I could hear, because the radio was up loud enough, it was changing the channels, and he continued to do that until he finally pushed a button which turned the radio off. At that time, I was I able to get him to open the door and step out of the car."

Clearly, on this record, we are talking about a suspect obeying a repeated command to exit the vehicle. In order for that police directive to pass constitutional muster, there must have at least been a reasonable suspicion, either of criminal activity or ordinance violation afoot or some type of public safety concern.

Third, it is legally improper for this Court or any other Court to rely

on Royer for the proposition that the police can request citizens to do anything without probable cause. Royer was a 5-to-4 holding, upholding suppression based on the scope of the investigatory stop (as opposed to the fact of it), but Justice Brennan, concurring in the result, dissented on the point of the initial stop. He noted that, per Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), the scope of any type of investigation must be extremely limited, or the exception will swallow the general rule that the Fourth Amendment searches and seizures are reasonable only if based on probable cause. 460 U.S. at 510-11, 103 S. Ct. at 133 1.

Because only four justices out of the nine agreed on the lack of probable cause ruling, it was error for this Court to cite Royer with any authority, either here or in Burkholder. It is well settled that when no single rationale commands a majority of the Supreme Court, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds. City of Lakewood v. Plain Dealer Publishing Company, 486 U.S. 750, 764, n. 9, 108 S. Ct. 2138, 2148, n. 9, 100 L. Ed. 2d 771 (1988), and cases cited therein. Thus, the Court's holding has to do with the scope of the investigatory stop, not the fact of it.

Fourthly, two courts have made the following comments regarding

Royer: A) it really applies only in cases that involve suspicions or pretexts involving drug traffic inGraham v. State, 705 A. 2d 82, 94-95 (Md. App. 1998). In other words, in cases that don't involve drug traffickers or drug trafficking, Royer simply is inapposite. That, of course, is the situation at bar. B) Royer is premised on the initial, brief encouter being under the circumstances where a reasonable person would feel free to leave without threat of compulsion or reprisal. United States v. Brumfield, 910 F. Supp. 1528, 1534 (D. Colo. 1996). If officer Myers was as persistant in telling Mr. Shelton to get out of his car as he testified, then obviously Mr. Shelton was not "free to leave at any time."

In sum, this Court's summary treatment of this issue is tantamount to saying that there is no such thing as the Fourth Amendment to the United States Constitution, and police are free to order people out of their vehicles at any time and investigate them for any reason, or, more to the point, for no reason at all. In no possible way is that the law of this country! This matter must be reheard, and this injustice must be corrected.

DATED this day of December, 1998.

Respectfully Submitted,

LAW OFFICES OF RICHARD F. CORNELL

150 Ridge Street, 2nd Floor

Reno, NV 89501

ATTORNEY'S CERTIFICATE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 28A.

I have read this brief before signing it;

To the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

The brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e) that every factual assertion in the brief regarding matters in the record is supported by appropri-

ate references to the record on appeal.

DATED this day of December, 1998.

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Richard F. Cornell, Esquire, and that on this date I caused to be delivered via Reno/Carson Messenger Service or, deposited for mailing in the United States Mail a true and correct copy of the foregoing document, addressed to:

Gary Hatlestad, Esq.

Washoe County District Attorneys

195 S. Sierra, Second Floor

Reno, Nevada 89501

DATED this day of December, 1998.

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYLE THOMAS SHELTON,
Appellant,
v.
STATE OF NEVADA,
Respondent.

CASE NO. 31390

APPELLANT'S PETITION FOR REHEARING

Second Judicial District
State of Nevada

THE HONORABLE JANET J. BERRY

Gary Hatlestad, D.D.A.
Attorney for Respondent
Washoe County District Attorney's Office
P.O. Box 11130
Reno, Nevada 89520

Richard F. Cornell, Esq.
Attorney for Appellant
150 Ridge Street Second Floor
Reno, Nevada 89501
(702)329-1141

NOW, Lyle T. Shelton, Appellant, and respectfully petitions this Honorable Court for a rehearing pursuant to NRAP 40 and a stay of the issuance of the remittitur pursuant to NRAP 41.

This Petition is brought on the grounds that this Court has overlooked or misapprehended a material matter of fact and a material issue of law pertaining to the Appellant's fifth issue on appeal: "The investigatory stop was

violative of the Appellant's Fourth Amendment rights" (Blue brief, pp. 30-34; Grey brief, pp. 1317).

DATED this 28 day of December, 1998.

Respectfully Submitted,

LAW OFFICES OF RICHARD F. CORNELL

150 Ridge Street, 2nd Floor

Reno, NV 89501

STATEMENT OF FACTS

We believe that the facts, as stated at pages 1-3 of the blue brief, are undisputed:

Daniel Myers, an officer with the Reno Police Department, was on patrol at approximately 11:30 p.m. on November 27, 1996, in the area of Cashill and Skyline Blvds. in Reno. As he drove north on Cashill, he saw a vehicle legally parked on the east side of the road. Mr. Shelton's vehicle was parked facing north, with its lights on and motor running. Officer Myers did

not see anyone in the vehicle at first, and his first concern was that someone might be hurt or the vehicle might have been subjected to a vehicle burglary. As he drove by slowly, however, he saw Mr. Shelton in the driver's seat, asleep or unconscious, and Mr. Shelton was leaning back against the seat. The seat was partially reclined. Mr. Shelton's hands were below the window. Mr. Shelton's seatbelt was unfastened. Officer Myers believed that when he first passed by, the vehicle was illegally parked as an unattended, running vehicle; but when he pulled up and saw Mr. Shelton in the driver's seat, he knew of no criminal violation at that point. He had no knowledge that anything illegal had occurred, and had no knowledge that Mr. Shelton needed any kind of assistance. Officer Myers tapped on the Appellant's window, to attempt to arouse him. After tapping on the roof of the car, Mr. Shelton came to in a startled fashion and started slapping hard at the driver's side window. Officer Myers yelled at the Appellant to turn off his engine. Mr. Shelton did so. Officer Myers asked Mr. Shelton to step out of his vehicle. Mr. Shelton did so. Mr. Shelton was parked in front of his own home. It is not unusual for people in that particular neighborhood to park their vehicles on the street.

Mr. Shelton's position is that his Fourth Amendment rights were violated when Officer Myers directed him to exit his vehicle, and investigated him further. Mr. Shelton asserts that, at the time he was told to leave his

vehicle, Officer Myers had no information that Mr. Shelton or anyone in that neighborhood had been involved in, or was the victim of, any criminal activity, and that there was no evidence at that point in time that Mr. Shelton was in any apparent or known distress. Further, at the time Officer Myers directed Mr. Shelton to exit the vehicle, Officer Myers had no information that Mr. Shelton had been drinking or was under the influence of intoxicants.

Both Respondent and this Court appear to concede, implicitly, that Officer Myers had no probable cause or reasonable suspicion to investigate anything, whether criminal/traffic violations or health and safety concerns, at the time Officer Myers directed Mr. Shelton to exit his vehicle. However, the position of the State is that Mr. Shelton, under those circumstances, has no Fourth Amendment rights; Officer Myers had the unfettered discretion to order Mr. Shelton to exit the vehicle, regardless of any cause or suspicion.

In its Order Dismissing Appeal, filed November 24, 1998, this Court adopted the State's position. Specifically, this Court stated:

Based on our review of the record on appeal, we conclude that the police officer's approach towards Appellant's vehicle, and the officer's act of tapping on the driver's side window, did not constitute an investigatory

stop from which the officer needed a reasonable suspicion of criminal activity. Because Appellant's vehicle was parked on a public street, the officer in question could permissibly approach Appellant's vehicle to question the Appellant or inquire into his welfare without running afoul of the Fourth Amendment. See: Florida v. Royer, 460 U.S. 491, 497 (1983); State v. Burkholder, 112 Nev. 535, 915 P. 2d 886 (1996). Accordingly, the police officer did not need a reasonable and articulable suspicion of criminal activity to approach Appellant's vehicle, and thus the encounter did not constitute an improper investigatory stop in violation of Appellant's Fourth Amendment rights.

DISCUSSION

We respectfully submit that this Honorable Court has severely misapprehended the issue. We don't disagree with the proposition that a police officer can approach a vehicle, tap on the driver's side window, wake the driver up, and signal to the driver to turn off the engine. But had Officer Myers done that, and nothing more, this case never would have happened. This case happened because Officer Myers ordered Mr. Shelton to exit the vehicle. Once Mr. Shelton complied, then, and only then, did Officer Myers discover Mr. Shelton's intoxication, which necessarily lead to his arrest.

The issue, therefore, is not whether a police officer can approach a vehicle or tap on a driver's side window without probable cause or a reasonable suspicion; the issue is whether such an officer can order a driver out of the car without probable cause or a reasonable suspicion.

The two cases cited by this Court do not address the issue. The holding of the United States Supreme Court in Florida v. Rover, supra, is that the defendant, who was a nervous young man paying cash for an airline ticket under an assumed name and carrying heavy bags, could be stopped on foot by the police in an airport and detained temporarily while the police attempted to dispel suspicions that he was a drug courier; however, the scope of that stop did not allow the police to retain his airplane tickets and driver's license and tell him that he was not free to depart.

Relying on this Court held in Burkholder that the police, while engaging in a "proactive drug recognition assignment" on foot, could approach a person on the street, and ask him if the police could search him without implicating his Fourth Amendment protections. Burkholder, 112 Nev. 538-39.

These problems attend, and cannot be reconciled with this Honorable Court's decision herein:

First, Royer and Burkholder are both "on foot" cases. This, however, is an "automobile" case, and the distinction is with a dramatic difference. As pointed out at page 13 of the grey brief, the United States Supreme Court has made it clear that the ability to order anybody - driver or passenger - out of a vehicle for any reason depends on a legitimate traffic stop to begin with. Maryland v. Wilson, 519 U.S. 408, 117 S. Ct. 882, 884-86, 137 L. Ed. 2d 41 (1997); Ohio v. Robinette, 519 U.S. 53, 117 S. Ct. 417, 420-21, 136 L. Ed. 2d 347 (1996), and cases cited therein. Ordering a passenger out of a vehicle remains a "seizure" within the meaning of the Fourth Amendment, but when it follows a lawful traffic stop, it is a Justified seizure. United States v. Shabazz, 993 F. 2d 431, 437 (5th Cir. 1993), citing Pennsylvania v. Mimms, 434 U.S. 106 (1977).

Obviously, Wilson and Robinette are the apposite Supreme Court authority, while equally as obviously, Royer is inapposite. In fact, after this Honorable Court decided this appeal, the United States Supreme Court handed down Knowles v. Iowa, U. S. (67 U.S.L.W. 4027-28, 12-8-98). There, the

United States Supreme Court unanimously held that where the police stop a defendant for speeding and issue a citation, the Fourth Amendment does not permit an officer to order a defendant out of a car and conduct a full field-type search of the vehicle. In so holding, the United States Supreme Court noted that while concern for officer safety justified a "minimal, additional intrusion" of ordering a driver and passengers out of a car after a routine traffic stop, that concern did not by itself justify the often considerably greater intrusion attending a full field-type search. Once a police officer orders a suspect out of a vehicle, further investigation depends on the standards of Terry v. Ohio, 392 U.S. 1 (1968), that is, a reasonable suspicion that the person may be armed and dangerous. Knowles 67 U.S.L.W. at 4028.

Secondly, even before the United States Supreme Court handed down Wilson, Robinette, and Knowles, the authority cited by Respondent to this Court pages 23-27 of the red brief proves beyond a shadow of a doubt that the distinction herein is the proper law and Respondent's position to this Court to the contrary is just plain illegal.

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was no power to the electric windows. I continued to ask him to open the door; however, he diverted his attention and started trying to manipulate controls in an apparent effort to turn off the lights, which, eventually, he did turn off the headlights to the car; and then, he turned the ignition to the "On" position, didn't restart the car, and then lowered the window instead of getting out of the car as I'd asked.

Once the window was down, I was still trying to get him to step out of the car. However, the ignition was still turned to the "on" position, even though the car was not running, and the radio was on. And, again, the driver became distracted to that, and he started pushing at the radio itself, like at the buttons and things, and I could hear, because the radio was up loud enough, it was changing the channels, and he continued to do that until he finally pushed a button which turned the radio off. At that time, I was I able to get him to open the door and step out of the car.

Clearly, on this record, we are talking about a suspect obeying a repeated command to exit the vehicle. In order for that police directive to pass constitutional muster, there must have at least been a reasonable suspicion, either of criminal activity or ordinance violation afoot or some type of public safety concern.

Third, it is legally improper for this Court or any other Court to rely or Royer for the proposition that the police can request citizens to do anything without probable cause was a 5-to-4 holding, upholding suppression based on the scope of the investigatory stop (as opposed to the fact of it), but Justice Brennan, concurring in the result, dissented on the point of the initial stop. He noted that, per Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), the scope of any type of investigation must be extremely limited, or the exception will swallow the general rule that the Fourth Amendment searches and seizures are reasonable only if based on probable cause. 460 U.S. at 510-11, 103 S. Ct. at 133 1.

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Fourthly, two courts have made the following comments: A) Royer really applies only in cases that involve suspicions or pretexts involving drug traffic. Graham v. State, 705 A. 2d 82, 94-95 (Md. App. 1998). In other words, in cases that don't involve drug traffickers or drug trafficking, Royer simply is inapposite. That, of course, is the situation at bar. B) Royer is premised on the initial, brief encouter being under the circumstances where a reasonable person would feel free to leave without threat of compulsion or reprisal. United States v. Brumfield, 910 F. Supp. 1528, 1534 (D. Colo. 1996). If officer Myers was as persistant in telling Mr. Shelton to get out of his car as he testified, then obviously Mr. Shelton was not "free to leave at any time."

In sum, this Court's summary treatment of this issue is tantamount to saying that there is no such thing as the Fourth Amendment to the United States Constitution, and police are free to order people out of their vehicles at any time and investigate them for any reason, or, more to the point, for no reason at all. In no possible way is that the law of this country! This matter must be reheard, and this injustice must be corrected.

DATED this day of December, 1998.

Respectfully Submitted,

LAW OFFICES OF RICHARD F. CORNELL

150 Ridge Street, 2nd Floor

Reno, NV 89501

ATTORNEY'S CERTIFICATE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 28A.

I have read this brief before signing it;

To the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

The brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e) that every factual assertion in the brief regarding matters in the record is supported by appropriate references to the record on appeal.

DATED this day of December, 1998.

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Richard F. Cornell, Esquire, and that on this date I caused to be delivered via Reno/ Carson Messenger Service or, deposited for mailing in the United States

Mail a true and correct copy of the foregoing document, addressed to:

Gary Hatlestad, Esq.

Washoe County District Attorneys

195 S. Sierra, Second Floor

Reno, Nevada 89501

DATED this day of December, 1998.

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYLE THOMAS SHELTON,
Appellant
v.
THE STATE OF NEVADA
Respondent.

No. 31390

ANSWER TO SHELTON'S PETITION FOR REHEARING

COMES NOW, the State of Nevada, by and through counsel, to respectfully request that this Court enter an order denying Shelton's petition for rehearing. This request is predicated on NRAP 40, and the accompanying discussion.

DISCUSSION

Shelton's petition is governed by NRAP 40. in salient part, the rule provides that matters presented in the briefs and oral argument may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing; on the other hand, rehearings may be allowed when it appears the Court has overlooked or misapprehended a material matter in the record or otherwise, or in such circumstances as will promote substantial justice. Given these standards, the State respectfully submits that Shelton's

claim comes up short of the mark.

The thrust of Shelton's argument is centered on his belief that the Court misapprehended the (real) issue in this appeal, and, following that observation, he goes on to critique and criticize the Court's ruling, a ruling "tantamount to saying that there is no such thing as the Fourth Amendment to the United States Constitution." For the reasons to follow, the State respectfully submits that Shelton's argument lacks merit.

First, Shelton contends that the issue on appeal was whether an officer can order a driver out of a car without probable cause or reasonable suspicion. Petition, p. 4, lines 21-25. To the extent that this was not the issue decided by the Court, we might ask why it was not. The reasons could stem from the fact that this issue was not the issue presented in Shelton's Fast Track Statement or his opening Brief. The issue in the briefs addressed whether Shelton was subjected to what Shelton called a "traffic stop." Appellant's Appendix, pp. 73, 77, 79; Fast Track Statement, pp. 8-9; Opening Brief, pp. 30-34.1 Shelton's documents were remarkably silent, however, about Officer Meyers, request to have Shelton exit the car, and the constitutional significance of that event, if any. Consequently, to the extent the Court did not decide this new issue, rehearing is not allowed.

Shelton did give passing reference to this issue in his Reply Brief (Reply Brief, p. 13, lines 2-8) , as he mindlessly accused the undersigned of wanting to create a police state. After this accusation, however, Shelton merely returned to debating the propriety of a traffic stop. Reply Brief, pp. 13-17.

To the extent the Court did decide this issue, Shelton has failed to identify any material matter overlooked or misapprehended by the Court in doing so. We will turn to that discussion now.

In the context of discussing the merits of the real issue on appeal, Shelton presents a statement of facts. While many of the facts are not in dispute, or, at least, not in serious dispute, we must take exception to what Shelton has left out of his recital: namely, that before Officer Meyers asked Shelton to step out of the car, Officer Meyers tapped on the window of the car, in an effort to determine Shelton's wellbeing, and Shelton basically went berserk, "slapping at the driver's window on the inside very hard," so hard in fact that Officer Meyers thought the window would break. AA, pp. 108, 115. Up to that moment, even by Shelton's own cites, Officer Meyers did not do anything prohibited by the Constitution; indeed, Officer Meyers, up to that moment, did not know if the occupant of the car was dead, hurt, merely sleep-

ing, or simply sleeping one off. Officer Meyers tapping on the window was designed to find out if Shelton was alright. AA, p. 115. Officer Meyers' request to have Shelton get out of the car was merely an extension of that concern. Cady v. Dumbrowski, 413 U.S. 433, 441 (1973); accord, State v. McAfee, 783 P.2d 874, 876-77 (Idaho App. 1989) - wherein a recently awakened defendant was asked to step outside of his vehicle prior to any attempt to inquire into his welfare. Couple these obviously legitimate concerns with Shelton's subsequent bizarre behaviors, actions which could only have served to pique Officer Meyers' concern for Shelton's welfare, and the reasonableness of Officer Meyers' conduct becomes even more reasonable. Perhaps this is why Shelton omitted these obviously material and outcome-oriented facts from his abbreviated and slanted recital.

With one notable exception, the remainder of Shelton's petition proceeds on the assumption that he is allowed to revisit the points and authorities already argued and rejected by this Court in his briefs and oral argument. Compare NRAP 40. Accordingly, rehearing should be denied.

The one exception to Shelton's overall strategy of revisiting his points and authorities involves his discussion of the recent United States Supreme Court decision in Knowles v. Iowa, 67 U.S.L.W. 4627, December 8, 1998.

This decision does not advance the debate of this case, however.

In Knowles, an Iowa police officer ticketed a driver for speeding, and incident to the issuance of the citation, conducted a full search of the car, without probable cause or reasonable suspicion, which netted some marijuana and drug paraphernalia. Knowles made a motion to suppress the seized items, because the search was not authorized by any exception to the Fourth Amendment warrant requirement, particularly as a search incident to an arrest. Iowa, however, claimed that the search was authorized by a state statute and Iowa Supreme Court decisions interpreting the statute which upheld the officer's action.

Ultimately, the United States Supreme Court held that this full-blown search could not be justified on the basis of it being a search incident to an arrest, but the Court did observe that, in the case of a routine traffic stop, "the concern for officer safety in this context may justify the minimal additional intrusion of ordering a driver and passengers out of the car." As noted, however, we are not talking about a traffic stop or a search incident to a traffic stop in the present case. Accordingly, Knowles has absolutely no application here.

In short, Shelton has failed to present any arguments within the contemplation of NRAP 40, justifying the relief requested. Rehearing should therefore be denied.

DATED: March 3, 1999.

CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, 1 hereby certify that I am an employee of the Washoe County District Attorney's Office and that on this date, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Richard F. Cornell, Esq.

150 Ridge Street, 2nd Floor

Reno, Nevada 89501

DATED: March 3, 1999

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYLE T. SHELTON,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

No. 31390

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

cc: Hon. Janet J. Berry, District Judge
Attorney General
Washoe County District Attorney
Richard F. Cornell
Washoe County Clerk

1 This petition challenges a decision that was issued prior to the expansion of the court from five to seven justices on January 4, 1999. Only those justices remaining on the court who previously heard this matter participated in this decision.

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYLE T. SHELTON, No. 31390
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

ORDER STAYING REMITTITUR

On November 24, 1998, we issued an order dismissing this appeal. On May 5, 1999, we denied appellant's petition for rehearing. Appellant has now filed a motion which seeks a stay of the remittitur to allow for the filing of a petition for a writ of certiorari with the United States Supreme Court. The motion is unopposed.

Cause appearing, we grant appellant's motion. We stay issuance of the remittitur herein to allow appellant to file a petition for a writ of certiorari with the United States Supreme Court. See NRAP 41(b). If prior.

of this court receives notice from the clerk of the United States Supreme Court that appellant has filed a petition for a writ of certiorari, this stay shall continue in effect until final disposition of the certiorari proceedings. Otherwise, the clerk of this court shall issue the remittitur on August 17, 1999.

It is so ORDERED.

cc: Attorney General
Washoe County District Attorney
Richard F. Cornell

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYLE THOMAS SHELTON,
Appellant,
v.
STATE OF NEVADA,
Respondent.

CASE NO. 31390

APPELLANT'S OPENING BRIEF

Second Judicial District
State of Nevada

THE HONORABLE JANET J. BERRY

Richard F. Cornell, Esq
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Reno, Nevada 89501 (702)329-1141

Gary Hatlestad, D.D.A.
Attorney for Respondent
Washoe County District Attorney's Office
P.O. Box 11130
Reno, Nevada 89520

I. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction after a jury trial. The judgment of conviction was entered orally, and later in writing, on November 13, 1997 (AA 13). A Notice of Appeal was filed on the same date. (AA 14) Therefore, this Court hasjurisdiction pursuant to NRS 177.015(3) and NRAP 4(b). Bail pending appeal has been granted.

Mr. Shelton was charged by Information with having committed a felony D.U.I., in violation of NRS 484.3792, in that he was in actual physical control" of a motor vehicle while under the influence of intoxicating liquor on November 27, 1996, having committed his third D.U.I. within seven years (AA 1). Mr. Shelton applied for habeas corpus, contending that the evidence was insufficient to force him to withstand a trial, and also that the term "actual physical control" as previously construed by this Court is unconstitutionally vague. (AA 2,3) The Court below, the Honorable Janet J. Berry, denied the challenge. (AA 7) Mr. Shelton then moved to suppress all evidence, contending that the investigatory stop of him was unconstitutional. (AA 8) That challenge was also denied. (AA 10) Mr. Shelton then went to jury trial, and the jury returned a guilty verdict. (AA 12)1

II. STATEMENT OF FACTS

Daniel Myers, an officer with the Reno Police Department, was on patrol at approximately 11:30 a.m. on November 27, 1996, in the area of Cashill and Skyline Boulevards in Reno. As he drove north on Cashill, he saw a vehicle legally parked on the east side of the road. (AA 15: 107 (2,5), 114 (31,32))Mr. Shelton's vehicle was parked facing north, with its lights on and motor running. Officer Myers did not see anyone in the vehicle at first, and his first con-

cern was that someone might be hurt or the vehicle might have been subjected to a vehicle burglary. As he drove by slowly, however, he saw Mr. Shelton in the driver's seat, asleep or unconscious, and Mr. Shelton was leaning back against the seat. (AA 15: 108 (6-7)) The seat was partially reclined. Mr. Shelton's hands were below the window. Mr. Shelton's seatbeat was unfastened. (AA 15: 109(12)) Mr. Shelton was not positioned in a normal driving position. (AA 15: 116 (91)) Officer Myers believed that when he first passed by, the vehicle was illegally parked as an unattended, running vehicle; but when he pulled up and saw Mr. Shelton in the driver's seat, he knew of no criminal violation at that point. He had no knowledge that anything illegal had occurred, and had no knowledge that Mr. Shelton needed any type of assistance. (AA 15: 114-15 (30-37)) Officer Myers tapped on the Appellant's window, to attempt to arouse him. After tapping on the roof of the car, Mr. Shelton came to in a startled fashion and started slapping hard at the driver's side window. Officer Myers yelled at the Appellant to turn off his engine. Mr. Shelton turned the key in the wrong direction, grinding the starter. He turned the key back, and turned off the engine. Officer Myers asked Mr. Shelton to step out of his vehicle. Mr.Shelton attempted to manipulate the controls of the vehicle, turned off the headlights, turned the ignition key to the "on', position and lowered the power window. (AA 15: 109, 116 (9-10, 38)) At no time did Mr. Shelton attempt to grab the steering wheel. (AA 15: 116 (38)) Mr. Shelton appeared disoriented, and stated had been drink-

ing earlier at a "place down on Wells Avenue." (AA 15: 109-110 (13-14))

Mr. Shelton had some reading glasses on the passenger seat of the vehicle. He needed them to read and to drive. (AA 15: Mr. Shelton was parked in front of his own home. (AA 115: 117 (43)) It is not unusual for people in that particular neighborhood to park their vehicles on the street. (AA 15: 9(50-51)) Officer Myers, and later Officer Meister, admitted they did not know at what time Mr. Shelton had left the restaurant; they thought it possible, since Mr. Shelton was impaired, that he thought what was meant by their question was what he had had to drink before he drove; and they did not ask him where he was going (AA 15: 117 (42); AA 16: 138 (34); 1341)).

Allison Benson, a long-time neighbor and friend of Mr. Shelton's, who has known the Appellant for six years, (AA 17: 152 (24)) Mr. Shelton has a habit of taking naps vehicle. Further, people who live in the row of condominiums where Mr. Shelton resides on Cashill generally park on the street, as the lot in the back is a very difficult place to park. (17 : 11 5 2 - 5 3 (2 6 - 2 7) Further, she called Mr. Shelton at his home on the evening of November 27, 1996, between 8:00 and 9:00 p.m., to invite him to dinner at her house the next day. (AA 17:53(27-28)).

Mr. Shelton testified. He resides at 3149 Cashill Blvd., Reno, Nevada. (AA 17: 156 (42)) He is a pilot who owns an air race business. (AA 17: 156 (42); 157 (44-46); 158 (47-48)) On November 27, 1996, he left work at 6:00 p.m. and ate dinner out. He then drove home and parked his vehicle on Cashill. (AA 17: "1-58 (46); 159 (51-52)) He then went into his home, where he was alone. (AA 17: 159 (52-53)) While inside his home, Mr. Shelton drank a 750 ml. period of white wine, which he kept in his refrigerator. (AA 17: 159 (53-54)) He subsequently received a call from Ms. Benson. (AA 17: 160 (55)) Mr. Shelton subsequently left his apartment to go to his vehicle, as he had left his briefcase in his vehicle, and wanted to look at some papers relative to his airplane project. (AA 17: 160-61 (58-59)) When Mr. Shelton got into his vehicle, he turned on the ignition and started the vehicle's engine in order to turn on the heater. He had the radio on. (A.A 17: 161 (60-61)) He turned on his vehicles headlights in order to read the odometer and make notes of the mileage in his log for I.R.S. purposes. (AA 17: 161 (61

Mr. Shelton became drowsy, put the seat into a reclined position, took off his glasses, and took a nap. He did not intend to drive the vehicle anywhere. (A-A 17: 162 (63-64, 65)) He was awakened by the police officer. He thought that the question asked by the officers had to do with what he drank at the

restaurant before he drove home. (AA 17: 163 (67-68)).

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is the evidence sufficient to sustain the judgment?

2. Was the jury instruction defining "actual physical control" prejudicially improper?

3. Is the term "actual physical control, as previously defined by this Court, unconstitutionally vague and ambiguous?

4. Was the investigatory stop of the Appellant violative of his Fourth Amendment rights?

5. Did the trial court commit prejudicial error in allowing the testimony of Merle Herman in order to pre-impeach the Appellant's anticipated testimony on a collateral matter?

IV. ARGUMENT

A. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE VERDICT

In 1989, this Court handed down a quartet of "actual physical control" cases which, to this day, are the jurisprudence in this State of that prima facie element of NRS 484.379. Unfortunately, taken together, the cases have created an enormous amount of confusion in this area of the law, as exemplified by the opinion of Las Vegas Deputy City Attorney, Bruce Nelson, who wrote an article for the Nevada Lawyer in August 1995 entitled "As Clear As Mud: Actual Physical Control in a D.U.I. Case." (AA: 30-32).

1 Where the undersigned quotes from the rough draft transcript, AA 15, 16 and 17, numbers such as "107" references the page number of the Appellant's Appendix. The parenthesed numbers such as (2, 5) references the page numbers within the four-page spread of each page of the rough draft transcript.

2 We have never contended that Mr. Shelton was not under the influence of intoxicating liquor during this incident and we concede such now.

IN THE SUPREME COURT OF NEVADA

LYLE T. SHELTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 31390

ORDER

On December 9, 1998, appellant filed a motion for an extension of time to file a petition for rehearing. Respondent has filed an opposition to the motion. Cause appearing, we grant appellant's motion. Accordingly, the clerk of this court shall forthwith file the petition for rehearing received on December 29, 1998. Respondent may, within fifteen (15) days of the date of this order, file an opposition to the petition for rehearing.

It is so ORDERED.

cc: Attorney General
Washoe County District Attorney
Richard F. Cornell

Appellant's motion for an extension of time also contained a request for a temporary stay of the remittitur to allow for the filing of the petition for rehearing. The remittitur not having issued, appellant's request for a temporary stay is denied as moot.

V. THE INVESTIGATORY STOP WAS VIOLATIVE OF THE APPELLANT'S FOURTH AMENDMENT RIGHTS.

The State's position appears to be that, as a matter of law, a police officer can approach a parked car and order the occupants out of it for no cause whatsoever; "officer safety concerns" are presumed as a matter of law. While this position might have some merit in a police state, it is not the law here.

First off, the U.S. Supreme Court seems to have made it relatively clear that the ability to order anybody-driver or passenger-out of a vehicle for any reason depends on a legitimate traffic stop to begin with. Maryland v. Wilson, U.S. 117 S.Ct. 882, 884-86, 137 L.Ed.2d 41 (1997); Ohio v. Robinette, U.S. 1 117 S.Ct. 417, 420-21, 136 L.Ed.2d 347 (1996), and cases cited therein. The rationale is that officer safety is a natural concern that follows a traffic stop. Wilson, 117 S.Ct. at 885-86. "Ordering a passenger out of a vehicle" remains a "seizure" within the meaning of the Fourth Amendment; but when it follows a lawftil traffic stop, it is a justified seizure. United States v. Shabazz, 993 F.2d 431, 437 (5th Cir 1993), citing Pennsylvania v. Mimms, 434 U.S. 106 (1977). But obviously, "officer safety" is not a concern viz. a sleeping occupant of a lawfully parked vehicle, who (at that point) is suspected of breaking no ordinance and is not suspected of having been the victim or the

perpetrator of any offense.

Secondly, Officer Myers did not testify to any "safety" concerns-his or Shelton's-in ordering Shelton out of the vehicle. If this case had happened in Oregon, the post Robinette case of State v. Morton, 951 P.2d 179 (Or. App. 1997) would mandate suppression. That case holds that where the officer's testimony is that he stopped a motor vehicle on the basis of investigation of a crime, but there was no probable cause to justify the stop on any basis, the officer could not later attempt to justify ordering the occupants out of the vehicle on "alleged public safety concerns." Morton, 951 P.2d at 182.

As AA 8 makes clear, Appellant's Motion to Suppress was based upon the testimony given at the preliminary hearing, and as AA 10 makes clear, no further testimony was adduced at the hearing on the Motion to Suppress.

At the preliminary hearing, Officer Myers testified that as he drove past Mr. Shelton's vehicle, "He had a number of concerns as why I turned around; concern for the vehicle, concern for what might be going,
some type of criminal activity or somebody breaking in the car, or left unattended or whatever."(AA 21:8)

On cross-examination, Officer Myers testified as follows:

Q: All right, when you said you turned around because you thought there was possibly some criminal activity, did it strike you that somebody could have been just warming up the car that night and waiting for it to warm up and there couldn't have been anything wrong whatsoever with the situation?

A: Yes. Other than the fact that there was a vehicle that had been left unattended that was running. If that

Q: But

A: Which may be a misdemeanor or something. But, yes, it did strike me as that. I just wanted to find out what the circumstances were.

Q: Just the fact that somebody had gone out and started up their car and let's say was warming it up and was waiting for it to warm up in the house, that wouldn't indicate to you any criminal activity per se?

A: I believe that there is a misdemeanor statute in Reno that says you

are not supposed to leave an unattended vehicle running. However, other than that, it's done and it's done oftentimes during the winter.

Q: And you don't consider that criminal activity, do you?

A: Well, it may be a crime, but it's not often enforced, I don't think."

(AA 21: 16-17)

Then at trial, Officer Myers admitted that, by the second pass-by and before rapping on the window, he realized that the vehicle was not unattended, and that fact took away any possible technical parking ordinance violation. (AA 15: 114 (32-33)) He further admitted that with the information he saw that night, there was no criminal violation taking place. (AA 15: 114 (33)) Officer Myers admitted that he was not aware of anything illegal going on at the time he approached Mr. Shelton's vehicle. (AA 15: 115 (34)) He testified that he wanted to make a determination as to why the person [Mr. Shelton] appeared to be unconscious, sitting in the car, or sleeping, as he had no idea. (AA 15: 115 (35))

Thus, the record belies the State's contentions. This was not a "public safety assistance" encounter by any means. When Officer Myers first passed by the

vehicle, he suspected that criminal activity might be afoot. However, by the time he rapped on Mr. Shelton's window, he knew that there was no crinfinal activity afoot--and certainly, the State has pointed to nothing in this record by which alleged criminal activity, even to the point of parking violations, could even be argued. Next, Officer Myers wanted to determine whether Mr. Shelton was sleeping or unconscious. However, upon rapping on the window, and before getting close enough to smell Mr. Shelton, Officer Myers knew that Mr. Shelton was sleeping, as Mr. Shelton awakened. And, as he awakened, there's nothing in this record to indicate that Mr. Shelton was in distress, prior to the time that Officer Myers ordered him out of his vehicle.

Thus, two things must be noted: 1) As in State v. Templeman , the affirming of a grant of a Motion to Suppress, where the initial reason for the stop was an investigation into vehicular activity that violated no law, the "later-formed" concerns about the defendants wellbeing should have been dispelled when the defendant exhibited well-being before being interrogated by the officers.

The proper scope of a stop ends when the reason for the initial stop has been completely processed and no further matter suggesting a broadening of the inquiry have been presented or such further matters have also been processed. State v. Ready, 556 N.W. 2d 264, 268-69 (Neb App. 1996) The Nebraska

Court of Appeals reversed the denial of the suppression motion in Ready,a mandate which should also attend here. As in R ad . the trial court here improperly based the alleged legality of the search on the Defendant's suspicious behavior after the police ordered the defendant out of the vehicle. See: Ready.

If this Court reaches this issue, it should hold that once Officer Myers approached the car and rapped on the window, and Mr. Shelton awakened and turned off the motor, at that point there was absolutely no reason-whether vehicle infraction, felony investigation, or public safety concern - for Officer Myers or for Mr. Shelton - to do anything further, and Officer Myers' encounter with Mr. Shelton should have ended right then and there. Because it did not, all matters which he found subsequent thereto must be suppressed.

DATED this day of 1998.

Respectfully submitted,

LAW OFFICES OF RICHARD F. CORNELL

150 Ridge Street

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BY:

Richard F. Cornell,

Attorney for Appellant

E. THE TRIAL COURT DID NOT ERR IN DENYING SHELTON'S MOTION TO SUPPRESS.

Shelton made a motion to suppress evidence he claimed was the fruit of an unreasonable seizure. The trial judge denied the motion; consequently, Shelton contends the trial judge erred.

The facts and circumstances surrounding the encounter between Officer Myers and Shelton are fully set forth above, so the State will not repeat them here again, but, obviously some of the points must be highlighted given Shelton's argument. Shelton's argument simply put is this: once Officer Myers concluded no crime was occurring in his presence, he had to return to his patrol

vehicle and drive off; consequently, since Officer Myers proceeded to check into Shelton's welfare, he acted unreasonably, in violation of Shelton's Fourth Amendment rights, and the fruits of this unreasonable intrusion should have been suppressed. Frankly, the State respectfully submits, this contention should not detain the Court long.

If anything rings true from Officer Myers, trial testimony, it is this: Up to and including, the moment he rapped on Shelton's window, he did not know why Shelton was in his apparent unconscious state with the lights of his car on and the motor running. AA, Exhibit 15, pp. 33-35. Shelton suggests that, because officer Myers did not know or merely knew the car was legally parked and occupied by an man, albeit unconscious, behind the steering wheel, he had to remain ignorant of all other details, and simply drive away. By implication, Shelton argues Officer Myers could not check into Shelton's welfare or take any other action. In other words, because Officer Myers did not know whether Shelton was in distress, hurt or dead, he was absolutely precluded from finding out.(6)

The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

BEST AVAILA

Certainly, Shelton's car, as an effect, and his person are protected by the Fourth Amendment. But not every officer / citizen encounter is a seizure. Indeed, in Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968), the Court observed that not all personal intercourse between police officers and citizens involves seizures of the person. Accord, State v. Burkholder, 112 Nev. (Adv Op. 74, May 1, 1996) - wherein the court observed that not all interactions between policemen and our citizenry involved a seizure of the person, and went on to observe that mere police questioning does not constitute a seizure the police may randomly without probable cause or reasonable suspicion - approach people in public places and speak with them. Having said this, however, it is far from clear that Shelton's rights were violated in this case.

Preliminarily, it should be noted that, although Shelton spreads a good bit of ink over the topic of traffic stops and why this encounter lacks sufficient cause or justification for the stop and resultant intrusion, this was no traffic stop. After all, Shelton was already parked; Shelton being stopped at the curb was not the result of State action. Accord. United State v. Kim. 25 F.3d 1426, 1430 (9th Cir. 1994). Consequently, the first question becomes how should the Myers/Shelton initial encounter be classified and what level of cause, if

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any, is needed to justify Officer Myers' actions.

First, it would appear that, up and including the time that Shelton got out of his car, there was no Fourth Amendment seizure; consequently, no level of suspicion was necessary. The overwhelming majority of cases, perhaps even the uniform rule is that a police officer may approach a parked car in a public place without that action constituting a seizure or investigative stop or any other higher echelon of seizure. Accord, State v. Zubizareta, 839 P.2d 1237 (Idaho 1992); State v. Kersh, .13 N.W. 566 (Iowa 1981) ; Crauthers v. State, 727 P. 2d 9, 11 (Alaska App. 1980) ; State v. Marks 602 P.2d 1344, 1350 (Kan. 1979); see generally, Lafave. 3
Search and Seizure, Section 9.2 (h) , pp. 408-9 (2nd Edition 1987) - As a result, Officer Myers did not violate Shelton's Fourth Amendment protection by approaching Shelton in a public place and tapping on hiswindow and asking him some questions. Accord, Florida v. Rover. 460 U.S. 491, 497-498 (1983).

In addition, and as conceded by Shelton, officer Myers did not really know what was confronting him that evening. All he truly knew was that an unconscious man was seated behind the steering wheel of a car legally parked in a residential neighborhood with the lights on and the motor running at 11:30

p.m. Given these undisputed facts, Officer Myers was justified to approach the vehicle and, at least, check on the driver's welfare. Again, as above, the overwhelming weight of authority supports such activity. See, for example, People v. Murray, 560 N.E. 2d 309, 312-14 (191. 1990) - wherein the court surveyed the weight of authority concludino, it is not unreasonable for an officer to approach a car and tap on the window, or even open the door of the car in which the occupant is asleep; Atchley v. State, 393 S-2d 1034, 1043-44 (Alaska App. 1981); State v. Clayton 748 P.2d 401, 402-4 (Idaho 1988). Indeed, Officer Myers had a duty to check on Shelton. Accord, Cady v. Dembrowski 413 U.S. 433, 441 (1973). See also, Mason v. State 603 P.2d 1146, 1148 (Okla. App. 1979).

In short, Officer Myers' conduct was reasonable ab initio. Once Shelton was outside the car and his state of sobriety became obvious, Officer Myers' decision to detain Shelton longer was based on articulable suspicion of DUI and was reasonable, and ultimately ballooned into probable cause and Shelton's arrest. Shelton's contention to the contrary simply lacks any merit.

6. Shelton's argument here is hard to follow. First, he concedes that officer Myers did not know if Shelton was the victim of a crime or may have been in any distress, Opening Brief, p. 30, 11. 1-10; Shelton even goes on to concede that the circumstances presented to Officer Myers were "unusual." Opening

Brief, p. 33, 11. 14-16. Shelton's concessions above, as will be demonstrated, torpedo his overall contention. Moreover, his discussion of traffic stops is frankly a non sequitur: Shelton was not the subject of a traffic stop; he parked his own car by himself.